आयकर अपीलीय अधिकरण, 'डी' न्याय पीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL , 'D' BENCH, CHENNAI
श्री धुव्वुरु आर.एल रेड्डी, न्यायिक सदस्य एवं श्री जी. मंजुनाथ , लेखा सदस्य के समक्ष
BEFORE SHRI DUVVURU RL REDDY, JUDICIAL MEMBER
AND SHRI G.MANJUNATHA, ACCOUNTANT MEMBER

आयकर अपील सं./**I.T.A.No.1663/Chny/2019**

(निर्धारणवर्ष / Assessment Year: 2009-10)

Deputy Commissioner of Income Tax, Corporate Circle-I(1), Chennai.	Vs	M/s. ABI Showatech (India) Ltd. 67, Chamiers Road, Chennai-600 028.
		PAN:AABCA8160B
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थी की ओरसे/ Appellant by	:	Mr. Suresh Periasamy,JCIT
प्रत्यर्थी की ओरसे/Respondent by	:	Mr. Saroj Kumar Parida, Advocate

सुनवाई की तारीख/Date of hearing	:	03.11.2020
घोषणा कीतारीख /Date of Pronouncement	:	04.12.2020

आदेश / O R D E R

PER G.MANJUNATHA, ACCOUNTANT MEMBER:

This appeal filed by the Revenue is directed against the order of the learned Commissioner of Income Tax (Appeals)-1, Chennai dated 11.03.2019 and pertains to the assessment year 2009-10.

2. The Revenue has raised the following grounds of appeal:-

"1. The order of the ld. CIT(A) is contrary to law, facts and circumstances of the case.

2.l. The CIT(A) failed to appreciate that the similar disallowance made by the AO for the A.Y.2014-15 in the assessee's own case was upheld by the CIT(A) vide order in ITA No.291/CIT(A)-1/2017-18 dt.30.1l.2017.

2.2. The CIT(A) ought to have appreciated that the relied upon decision in the case of M/ s. Faizan Shoes is not

applicable for the instant case in as much as in the relied upon decision, the commission was paid to non-resident commission agent for procuring export orders from overseas buyers @ 2.5% commission, whereas in the instant case 10% commission was paid to M/s.Biggleswade Ltd., Hong Kong and the services rendered was related to promotion of sales, managing receivables accounts, giving advisory regarding credit rating and credentials of the buyer which was in the nature of managerial/technical/consultancy service and also fit into the definition of Royalty and Technical Service as per article 12 clause 2 and article 13 clause 3 of India-Hong Kong DTAA."

3. Brief facts of the case are that the assessee is engaged in the business of manufacture of components for automobiles and filed its return of income for the assessment year 2009-10 disclosing total income of ₹ 2,18,19,518/-. The assessment has been originally completed u/s.143(3) of the Income Tax Actm1961 (hereinafter referred to as "the Act") determining total income of ₹ 18,61,46,990/-. For the relevant assessment year 2009-10, the Tribunal had remitted the appeal back to the file of the Assessing Officer to consider the issue of determination of export turnover deduction u/s.10B and disallowance of expenses u/s.40(a)(i) of the Act and commission payment to non-resident export agent. The Assessing Officer in the second round of proceedings, consequent to the directions of the Tribunal had disallowed the commission payment to non-resident export agent of ₹ 3,02,34,070/- stating that the Department has consistently held that export commission

paid by the assessee to M/s.Biggleswade Ltd., Hong Kong, as fees for technical services liable for TDS u/s.195 of the Act and consequently for non-deduction of tax at source, the amount is not allowable as deduction u/s.40(a)(i) of the Act. The Assessing Officer was further of the opinion that while completing the assessment circular issued by CBDT vide No.7 of 2009 dated 22.10.2009 was taken into cognizance and also the department has not accepted the orders of the Tribunal on the issue and further appeal filed before the jurisdictional High Court is pending for adjudication.

4. Being aggrieved by the assessment order, the assessee preferred an appeal before the learned CIT(A). Before the learned CIT(A), the assessee submitted that the Assessing Officer has erred in disallowing export commission payment to non-resident agents for services rendered outside India u/s.40(a)(i) of the Act for non-deduction of tax at source without appreciating the fact that commission paid to non-resident agents for services rendered outside India is not taxable in India and consequently assessee is not liable to deduct TDS u/s.195 of the Act . The learned CIT(A) after considering the facts and also taken support from his predecessor CIT(A) order for the assessment year 2010-11 deleted

the additions made by the Assessing Officer towards disallowance of export commission paid to non-resident agents u/s.40(a)(i) of the Act on the ground that commission payment to non-resident agents for services rendered outside India is not taxable in India, consequently assessee is not required to deduct TDS u/s.195 of the Act and hence, no disallowance could be made u/s.40(a)(i) of the Act for non-deduction of TDS. Aggrieved by the order passed by the learned CIT(A), the Revenue is in appeal before us.

5. The learned DR submitted that learned CIT(A) has erred in deleting the additions made towards disallowance of export commission paid to non-resident agents by relying upon the decision of the Hon'ble Madras High Court in the case of M/s. Faizan Shoes Pvt.Ltd (2014) 367 ITR 155 without appreciating the fact that in that case commission was paid to non-resident agent for procuring export orders from overseas buyers, whereas in the instant case, commission was paid to M/s.Biggleswade Ltd., Hong Kong, for various services including the services rendered in relation to promotion of sales, managing receivable accounts, giving advisory regarding credit rating and credentials of the buyer which was in the nature of managerial/technical/consultancy services and also fit into the definition of royalty and fees for

technical services as per Article 12 clause 2 and Article 13 clause 3 of India-Hong Kong DTAA.

6. The learned AR, on the other hand, supporting the order of the learned CIT(A) submitted that the issue is squarely covered in favour of the assessee by the decision of the Chennai Benches of the Tribunal in the case of M/s.Turbo Energy Ltd., a group company of the assessee, where the Tribunal after considering relevant facts had held that even after amendment by the Finance Act, 2010 with effect from 01.04.1976, Explanation to section 9(2) of the Act, there is no provision to tax the payment made to the services rendered outside India by foreign agents u/s. 9(1)(vii) of the Act. The learned AR further submitted that the assessee is consistently making payments of commission to non-resident agents right from assessment year 2006-07 to assessment year 2013-14 and the department has accepted the said commission payments as deductible without deduction of tax at source u/s.195 of the Act for the assessment year 2006-07 to 2008-09 and 2010-11. Further, although the Assessing Officer has disallowed commission payment for assessment year 2012-13 and 2013-14, but the learned CIT(A) has allowed relief to the assessee and the department has accepted the findings of the CIT(A) without any further appeal, but for the year

under consideration, the department has challenged the disallowances even though the learned CIT(A) has allowed relief by following the decision of the Hon'ble Madras High Court in the case of Faizan Shoes Pvt.Ltd.(supra).

7. We have heard both the parties, perused the materials available on record and the orders of the authorities below. We find that an identical issue has been considered by the Tribunal in the case of M/s. Turbo Energy Ltd. Vs. DCIT for the assessment year 2007-08 to 2009-10 in ITA No.351,316 & 317/Mds/2014 dated 03.05.2017 and by following the decision of the Hon'ble Madras High Court in the case of CIT vs. Faizan Shoes Pvt.Ltd (supra), held that services rendered by the foreign agents was to canvass the assessee's products outside India and no managerial or consultancy services were rendered by the foreign agents. Further, the entire services rendered outside India and the foreign agents do not have any permanent establishment or business connection in India. The Tribunal further held that nature of services rendered by the foreign agents do not fall under the category of fees for technical services which can be taxed under section 9(1)(vii) of the Act. The Tribunal has also taken note of amendment to Explanation

to Section 9(2) of the Finance Act, 2010 w.e.f. 01.04.1976 and held that despite the deeming fiction in section 9(1)(vii) of the Act to tax fees for technical services, but the nature of services rendered by foreign agents do not have territorial nexus to tax the same as royalty/ FTS u/s. 9(1)(vii) of the Act. The relevant findings of the Tribunal are as under:-

> ***"7.5*** *We heard both the parties and perused the material placed on record.*
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> *The Ld.AR argued that the services rendered by the foreign agent was to canvass the assessee's products outside India and no managerial and consultancy services were rendered by the foreign agents. The entire services were rendered outside India and the party does not have any permanent establishment or business connection in India. The nature of services rendered was examined by the Ld.CIT(A) and given a finding that the services do not fall under the category of managerial services to be taxed u/s 9(1)(vii) of IT act as FTS. On similar facts in the case of M/s.Brakes India Ltd., in ITA No.266/2012 dated 22.03.2013, the ITAT, Chennai has decided the issue in favour of the assessee. The assessee has relied on the following decisions also:*
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> *CIT v. Faizan Shoes (TCA No.789 of 2013) (Mad HC)*
> *ACIT v. Farida (ITA No.359/Mds/2013)*
> *Delta Shoes Pvt. Ltd. (ITA No.909/Mds.2013)*
>
> *The Entire services were rendered outside India and the party does not have any establishment or business connection in India. The Ld.CIT(A) has allowed the assessee's appeal following the decision of the Hon'ble Supreme Court and the jurisdictional High Court in the case of Faizan shoes which supports the assessee's case. Therefore, we do not find any reason to interfere with the order of the Ld.CIT(A) and the same is upheld.*
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> ***7.6*** *Even otherwise, Explanation to See. 9(2) of IT Act is amended by Finance Act, 2010 w.e.f. 01.04.1976. The*

*assessment year involved is **2007-08 to 2009-10** and there js no provision to tax the payments made to the services rendered outside India to the foreign agents in the Income Tax ujs.9(1)(vii) prior to the amendment. This view is upheld by the decision of the Hon'ble Supreme Court relied upon by the Ld.AR in the case of Ishikawajima-Harima Heavy Industries Ltd vs. DIT (2007) (288 ITR 408) which clarified that despite the deeming fiction in section 9, for any such income to be taxable in India, there must be sufficient territorial nexus between such income and the territory of India. It further held that for establishing such territorial nexus, the services have to be rendered in India as well as utilized in India. The explanation to section 9(2) was introduced by Finance Act 2010. w.e.f.1976 and as on the date of assessment there was no such provision to tax the FTS rendered outside India and hence we agree with the Ld.A.R that no tax is deductible u/s 195 and consequent disallowance is not called for."*

8. In this case, on perusal of the facts available on record, we find that the assessee has made payment to M/s.Biggleswade Ltd., Hong Kong, a non-resident agent who rendered services to the assessee outside India for marketing the products of the assessee. Further, the assessee has filed necessary evidence to prove that although the agreement between the parties specifies various services but payment made for the impugned assessment year is only for export sales and such services are rendered outside India. Therefore, considering the facts and circumstances of the case and also the consistent view taken by the co-ordinate Bench in the case of M/s. Turbo Energy Ltd. (supra), we are of the view that the export commission paid to foreign agents for rendering services outside India is not liable for deduction of tax at source u/s.195 of

the Act and consequently, no disallowance could be made u/s.40(a)(i) of the Act for non-deduction of TDS. The learned CIT(A) after considering the relevant facts and also by following the decision of the Hon'ble High Court in the case of Faizan Shoes Pvt.Ltd, (supra) has rightly deleted the addition made towards disallowance of export commission made to non-resident agents and hence, we are inclined to uphold the order learned CIT(A) and dismiss the appeal filed by the Revenue.

9. In the result, the appeal filed by the Revenue is dismissed.

Order pronounced in the open court on 4th December, 2020

Sd/-	Sd/-
(धुव्वुरु आर.एल रेड्डी)	**(जी.मंजुनाथ)**
(Duvvuru RL Reddy)	(G.Manjunatha)
न्यायिक सदस्य /Judicial Member	लेखा सदस्य / Accountant Member

चेन्नई/Chennai,
दिनांक/Dated 4th December, 2020
DS

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. Appellant 2. Respondent 3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT 5. विभागीय प्रतिनिधि/DR 6. गार्ड फाईल/GF.